Supreme Court, U.S.
FILED
MAR 18 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1268

PATRICIA R. HARRIS, Secretary of Health, Education and Welfare,
Appellant,

—v.—

CORA MCRAE, *et al.*,
Appellees.

PATRICIA R. HARRIS, Secretary of Health, Education and Welfare,
Appellant,

—v.—

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,
Appellee.

BRIEF AMICI CURIAE of the The Association of Legal Aid Attorneys of the City of New York—District 65—U.A.W.; Baltimore Abortion Right; The Comision Femenil Mexicana Nacional; The Committee for Abortion Rights and Against Sterilization Abuse; The Committee to End Sterilization Abuse; District 1199, National Union of Hospital and Health Care Employees, R.W.D.S.U., AFL-CIO; Education for Freedom of Choice in Ohio; Grand Jury Project; La Raza Legal Alliance; The National Bar Association; The National Conference of Black Lawyers; The National Emergency Civil Liberties Committee; The National Lawyers Guild; The National Organization of Legal Services Workers; The National Women's Health Network; The Reproductive Rights National Network; Rochester Women Against Violence Against Women; Social Services Employees Union, Local 371, District Council 37, A.F.S.C.M.E., AFL-CIO; The United Electrical, Radio and Machine Workers of America; The Women's Justice Center

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Schloendorf v. The Society of New York Hospital, 211 N.Y. 125, 105 N.E. 92 (Ct.App. 1914)	58

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42 U.S.C. §708.....	passim
42 U.S.C. §1396 et seq.	passim
42 CFR §50.204.....	passim
42 CFR §440.220.....	passim
43 CFR §50.209(a).....	passim
Title XIX, Social Security Act, §1903(5).....	passim
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ACUTE AND CHRONIC CONDITION AND MEDICAL CARE: OCTOBER 1963 - NOVEMBER 1964, a publication of the University of Puerto Rico and the Puerto Rico Department of Health.....	33
Ayres, Sterilizing the Poor, THE NATION (July 8, 1973).....	39
Bogue and Sigelman, Sterilization Report No.13: Continuing Violations of Federal Sterilization Guidelines by Teaching Hospitals in 1979, PUBLIC CITIZEN (July 17, 1979).....	52
Daily and Nicolas, Tubal Ligation on General Service Patients Seen by Peer Level Family Counselors in Thirty New York City Voluntary and Municipal Hospitals, 123 AM. J. OF OBSTETRICS AND GYNECOLOGY 656 (1975).....	24
Department of Health, Education and Welfare, Sterilization and Abortions: Federal Financial Participation, 45 Fed.Reg. 52 (1978).....	45
Eliot and Wilson, The Obstetrician's View, ABORTION IN A CHANGING WORLD, Columbia University Press (1970).	28
1 FAMILY PLANNING DIGEST 3 (1972).....	36,44
11 FAMILY PLANNING PERSPECTIVES 253 (1979).....	36
General Accounting Office, Report #B-164031(5).....	35

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Greenspan, THE COLLABORATIVE REVIEW OF STERILIZATION (CREST), paper presented to the American Public Health Association (Nov.2,1977)... 55

Hellman, Louise, M.D., The Sterilization of Minors and Others Legally Incapable of Consenting: A Review of Current Information, Public Health Center (December 28, 1973)..... 38

Law, Sterilization Comes Easier for the Disadvantaged, N.Y.U. LAW J. 16 (1976)..... 41

McGarrah, Sterilization Without Consent: Teaching Hospital Violations of HEW Regulations, Health Research Group (January 1975)..... 42

Presser, VOLUNTARY STERILIZATION: A WORLD VIEW - 5 REPORTS ON POPULATION/FAMILY PLANNING (1970)..... 33,35

Quay, Justifiable Abortion: Medical and Legal Foundations, 29 GEO.LAW J. 509 (1961)..... 34

Rosenfeld, Wolfe and McGarrah, Health Research Group Study on Surgical Sterilizations: Present Abuse and Proposed Regulations, Washington, D.C. (October 1973).. 43

Rothchild, Why Sterilization Guidelines are Needed (N.Y.C./ H.H.C. December 10, 1975)..... 24

San Juan Star, January 21, 1975, cited by EPICA Task Force, PUERTO RICO: A PEOPLE CHALLENGING COLONIALISM (1976)..... 33

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Spriggs, Note, Involuntary Sterilization: An Unconstitutional Menace to Minorities and the Poor, 4 NYU REV. OF LAW AND SOCIAL CHANGE 127 (Spring 1974)..... 41,44

Tietze, INDUCED ABORTION: 1979, a Population Council Fact Book (3rd. ed., 1979)..... 55

Vasques Calzada, LA SITUACION POBLACIONEL EN PUERTO RICO (1968)..... 33

Vaugh and Sparer, 6 FAMILY PLANNING PERSPECTIVES 224 (1974)..... 29

Westoff, C.A. and Westoff, C.F., FERTILITY, CONTRACEPTION AND ABORTION IN AMERICA (1971)..... 36

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NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION,

Appellee.

On Appeal from the United States
District Court for the Eastern
District of New York

BRIEF AMICI CURIAE OF THE ASSOCIATION OF LEGAL AID ATTORNEYS, ET AL.

INTEREST OF THE AMICI CURIAE

This brief of the Association of Legal Aid Attorneys of the City of New York, District 65, U.A.W; Baltimore Abortion Right; Comision Femenil Mexicana Nacional; Committee for Abortion Rights and Against Sterilization Abuse; Committee to End Sterilization Abuse; District 1199, National Union of Hospital and Health Care Employees, R.W.D.S.U., AFL-CIO; Education for Freedom of Choice in Ohio; Grand Jury Project; La Raza Legal Alliance; National Bar Association; National Conference of Black Lawyers; National Emergency Civil Liberties Committee; National Lawyers Guild; National Organization of Legal Services Workers; National Women's Health Network Reproductive Rights National Network; Rochester Women Against Violence Against Women; Social Service Employees Union, Local 371, District Council 37; United Electrical, Radio, and Machine Workers of America and the Women's Justice Center is submitted in support of the appellees with the oral consent of all parties. The consents will be filed with the Clerk of the Court.

Amici organizations all have been

actively involved in representing the interests of women adversely affected by the restrictions on Medicaid funding for elective and therapeutic abortions and involuntary sterilizations. Amici organizations are concerned that the Hyde Amendment, which denies Medicaid funding for abortions, forces poor, working and minority women to seek dangerous illegal abortions, and that the Hyde Amendment makes women increasingly vulnerable to sterilization abuse.

The ASSOCIATION OF LEGAL AID ATTORNEYS OF THE CITY OF NEW YORK - DISTRICT 65 - U.A.W. is a staff Union for all attorneys employed by the Legal Aid Society in New York City. The Association is the collective bargaining agent for the nearly 600 lawyers who have committed their skills to the representation of poor people charged with crimes. The Association recognizes the need for free and low cost medical assistance and is vitally committed to the existence of a statutory structure which allows its client community to be able to be eligible for funded abortions.

BALTIMORE ABORTION RIGHT is a community group which aims to make options available for women's reproductive choice. During the last year, it sponsored community symposia on abortion rights and sterilization abuse. Its

activities have been coordinated with national abortion rights projects.

The COMISION FEMENIL MEXICANA NACIONAL, with 2,000 members, is committed to furthering the interests of the Mexican-American community nationwide. It has initiated litigation against the State of California and doctors and hospitals to remedy sterilization abuse and it has fought for California's sterilization regulation; the first laws passed in the nation. The Comision was a plaintiff in the suit which enjoined California from implementing restrictions on MediCal funded abortions.

The COMMITTEE FOR ABORTION RIGHTS AND AGAINST STERILIZATION ABUSE ("CARASA"). In August, 1977, CARASA launched the battle in New York City against the attacks on reproductive freedom posed by the Hyde Amendment and the Supreme Court's decisions upholding the states' refusal to fund elective abortions. A group of concerned women, afraid that poor women's limited access to abortion and the easy availability of sterilization would increase the incidence of sterilization abuse, founded CARASA. Two years later, CARASA has a constituency of 1,000 people and several hundred active members working in the community to educate and organize people

around the issues of reproductive freedom. It also works in the legislature to bring about legislation which would provide all women with unimpeded access to abortion, freedom from involuntary sterilization, safe and reliable contraception and a decent quality of life in which people can raise their children.

The COMMITTEE TO END STERILIZATION ABUSE ("CESA") is dedicated to protecting, through education, organizing, legislative work and oversight of hospital practices, the interests of people subject to sterilization abuse. It has ten nationwide affiliates comprised of health care workers, community activists and members of affected communities. CESA was one of the key groups involved in bringing about protective sterilization guidelines in the City of New York and in having these regulations adopted by the Department of Health, Education and Welfare.

Active in the struggle to restore Medicaid funded abortions, CESA believes that the unavailability of abortion and the continued funding for 90 percent of the cost of sterilization are critical factors contributing to sterilization abuse.

DISTRICT 1199, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, R.W.D.S.U.,

AFL-CIO ("District 1199") represents 100,000 health care workers nationwide. Its membership is predominately Black, Latin and female. District 1199 is deeply involved in efforts to improve the quality of health care and to extend health care to all people. These efforts include support for the right of women to make free choices with regard to child bearing and the opportunity for women to freely utilize, without economic coercion, the necessary medical procedures to effectuate such choices.

EDUCATION FOR FREEDOM OF CHOICE IN OHIO, INC. ("EFCO") is a non-profit, tax-exempt organization, dedicated to community education on the need to secure safe abortion for all women who might choose it - rich or poor. EVCO serves as an information resource for various reproductive rights groups and groups opposed to sterilization abuse in Ohio. It is dedicated to enabling women to obtain the full range of family planning options without coercion, whether subtle or overt.

The GRAND JURY PROJECT was founded to assist persons who are victimized by grand jury abuse. In the past decade, activists in the movements for women's and gay rights have been among the primary targets of the Grand Jury. Support for the goals

of the women's movement leads to support for reproductive rights by the Grand Jury Project.

LA RAZA LEGAL ALLIANCE is an organization of Latino legal workers organized to take legal and political action against the oppression and exploitation of the Latino community. It is dedicated to the struggle for democratic and human rights of all Latino people, including the right to bilingual, bicultural education, medical care, jobs, decent housing, the right to organize, emigration and immigration freedom and the right to be free from racial, sexual and national discrimination.

La Raza Legal Alliance has eighty-three chapters located throughout the United States, with a membership of some five hundred people. Its National Office is located in Houston, Texas. It has commited its resources towards legal and political action to prevent sterilization abuse.

The NATIONAL BAR ASSOCIATION, founded in 1925, is a professional membership organization which represents more than 12,000 Black attorneys, Judges and law students. Its purposes include achieving equal opportunities for minorities in the legal profession and protecting the civil and political rights of all citizens. To effectuate its goal of racial and sexual equality, the National Bar

Association, through its Women's Division, has been actively involved in issues concerning child abuse and reproductive rights.

The NATIONAL CONFERENCE OF BLACK LAWYERS ("NCBL")is an activist legal organization of Black lawyers, law professors, Judges and law students dedicated to serving as the legal arm of the Black community. Since its inception in 1968, NCBL has been actively involved in the continuing struggle for equal employment opportunity, and racial and sexual equality.

The National Conference of Black Lawyers was chartered to work for the elimination of racism in the law and to address the problems of the Black community. Thus, NCBL, through its Women's Rights Task Force, is concerned with the discriminatory impact from cutbacks in funded abortions and the disproportionate impact of sterilization abuse. The NCBL is concerned that the inability of indigent Black women to obtain medically necessary abortions will have an adverse impact on their health and well-being.

The NATIONAL EMERGENCY CIVIL LIBERTIES COMMITTEE ("ECLC") is a not-for-profit organization dedicated to the defense of the Bill of Rights and its extension to all our people -- particularly the poor and the powerless. Founded in 1951, the organization

has worked to achieve these goals through litigation and public education. Among the cases it has sponsored in this Court are Kent v. Dulles, 357 U.S. 116; Kleindienst v. Mandel, 408 U. S. 753, and Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154. Through similar means, it has sought to protect the right of reproductive freedom and the right to equal protection of the law at issue in this case.

The NATIONAL LAWYERS GUILD ("NLG") is an organization of 7,000 lawyers, law students and legal workers dedicated to the goal of full equality for all people. Since its inception in 1937, the NLG has worked consistently for the advancement of the rights of poor and working people, racial minorities and women.

In the past decade, its work to support the women's movement has become an organizational priority. The National Lawyers Guild, a founding member of the Reproductive Rights National Network, is actively involved in protection of reproductive rights for poor, minority and working women. Individual NLG members, in cases brought throughout the nation, represent litigants seeking to prevent cutbacks in funded abortions or attempting to end sterilization abuse.

The NATIONAL ORGANIZATION OF LEGAL SERVICES WORKERS ("NOLSW") is the Union representing the lawyers and legal workers who provide civil representation to the poor. Among its clients are destitute women who are denied the right to choose whether to bear a child merely because Medicaid arbitrarily will not pay for an abortion while funding is available for prenatal care and the costs of birth. NOLSW has dedicated itself to eliminating all forms of injustice to the poor. NOLSW stands opposed to any infringement upon the basic rights of people merely because of their poverty. It believes that the right to choose is of such personal consequence that it is not to be intruded upon by the government.

The NATIONAL WOMEN'S HEALTH NETWORK ("NWHN") is a national consumer organization which focuses on women's health. It has 2,200 members, 118 of which are organizations: including health care centers, consumer groups, women's health organizations and health education projects. Twenty percent of its individual members are physicians and nurses. It represents groups as diverse as the American Foundation for Maternal and Child Health and the American College of Nurses and Midwives. In the area of sterilization abuse,

NWHN currently is developing a manual to monitor the Department of Health, Education and Welfare sterilization regulations on a national basis. Other groups appearing herein as amici also are participating in this monitoring project.

The REPRODUCTIVE RIGHTS NATIONAL NETWORK is a national organization working to defend abortion rights and to end sterilization abuse and promote occupational safety and health throughout the country. The following organizations belong to the Reproductive Rights National Network: New American Movement; Abortion Action Coalition, Boston; Abortion Rights Coalition, Cincinnati; Buffalo CARASA; Chicago Women's Health Task Force; Chicago Women Organized for Reproductive Choice; Cleveland Pro-Choice Action Committee; International Socialists; International Socialist Organization; New York CARASA; Emma Goldman Clinic for Women, Iowa City, Iowa; Coalition for the Medical Rights of Women, San Francisco; Dayton Freedom of Choice, Dayton, Ohio; Committee to Defend Reproductive Rights, San Francisco; Eugene Socialist Feminist Task Force, Oregon; Hartford CESA; Healthright, New York City; Ithaca Reproductive Rights Task Force; Long Island CARASA; Michigan Coalition for Reproductive Rights; Minneapolis CARASA;

National Lawyers Guild; New Haven Feminist Union; Reproductive Rights Task Force, New Haven, Conn.; New Jersey CARASA; New York CESA; Philadelphia Reproductive Rights Coalition; Reproductive Rights Organizing Committee, Santa Monica, Ca.; Rochester Progressive Movement; St. Louis Pro-Choice Group; Union Wage, San Francisco; Women and Children's Rights Coalition, Portland, Oregon; and Reproductive Rights Organization, Madison, Wisconsin.

ROCHESTER WOMEN AGAINST VIOLENCE AGAINST WOMEN (Rochester "WAVAW") is a community organization of feminists formed in 1977 in Rochester, New York. It works against the violence which terrorizes and harms women. Some of its specific concerns are rape, battering, sexual harassment, reproductive rights, pornography and the cultural acceptance of degrading images of women as "chic" or entertaining.

The SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371, DISTRICT COUNCIL 37, AMERICAN FEDERATION, STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO ("Local 371") is a 10,000 member Union of employees of the City of New York. Local 371 works in hospitals, social services, housing, community development, and other city human services agencies. At a Union

meeting in May, 1974, an overwhelming majority of its members went on record in support of abortion and against forced sterilization. The Union took this position because it was concerned with the negative impact restricted access to abortion has on the indigent. An obvious result of the restriction is unwanted children, with the accompanying problems of child neglect and abuse which can lead to foster placement and sometimes even death for the child. Adoption is not a viable alternative, as securing placements for these children often is extremely difficult.

Local 371 is concerned that having an unwanted child also leads to unemployability for the mother for a period of two to six years, and prevents the woman from developing the skills she will need to enter the job market. Young mothers are routinely forced out of school to attend to their children and never receive the basic education they need to secure employment.

Local 371 is cognizant of the fact that contraception is not available to girls or women in the poor neighborhoods of New York City. Contraception is not discussed in the schools, the birth control clinics developed during the War on Poverty have been closed by cutbacks in funding and the public hospitals

in New York City cannot meet this need since they are suffering from escalating cutbacks.

Local 371 expresses its general concern that the denial of funding for Medicaid abortions serves to perpetuate the cycle of poverty and despair for a large segment of our population.

The UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA ("UE") is a labor organization as defined by the National Labor Relations Act. It represents thousands of employees of manufacturers of electrical products and equipment, machinery, appliances machine tools and allied products throughout the United States and Canada. Women comprise approximately one-quarter of UE's membership.

The UE was founded in 1936 for the purpose of uniting employees, regardless of craft, age, sex, nationality, race, creed or political belief in order to improve their working and living conditions. To that end, the Union has, since its inception, opposed discrimination against women, particularly poor and working women.

At its most recent convention in September, 1979, the UE membership resolved that: "Our Union support the right of all women, if they so choose, to obtain safe, legal abortions and that we oppose cutbacks in

Medicaid funding for abortions."

Only with the right to choose whether and when to bear children can women participate fully, actively, and unite in the fight to improve conditions for all.

The WOMEN'S JUSTICE CENTER is an incorporated, tax-exempt, public interest organization, founded in 1976 in Detroit, Michigan. It operates several different programs, including: a telephone referral service; a speaker's bureau and the initiation of litigation. It recently filed a case concerning two Detroit High School women who were denied admission into the honor's program because they were single mothers. It also has litigated cases concerning pregnacy discrimination.

SUMMARY OF ARGUMENT

The Hyde Amendment restrictions on Medicaid abortion funding, coupled with the availability of public funding for sterilization, compel many Medicaid recipients to resort to irreversible sterilization to avoid unwanted or medically injurious pregnancies. This coerced sterilization invidiously discriminates against poor and minority women and deprives them of their constitutional rights to privacy, liberty and equal protection.

I.

Sterilization abuse is the involuntary termination of reproductive capacity. Sterilization is involuntary when a woman is not informed that the procedure is being performed, or is misinformed, or is overtly coerced into consent (e.g., by the threat of denial of other medical services).

Similarly, a woman's consent is involuntary when given in default, because other reasonable choices are foreclosed. Many women wish to avoid an unwanted pregnancy while retaining their childbearing capacity. When they are nonetheless forced to undergo sterilization because of the unavailability of abortion, they are not

voluntarily consenting; they are merely acquiescing to force majeure.

Prior to legalization of abortion women were often able to obtain an abortion only if they would agree to concurrent sterilization. Racial minorities and welfare recipients were sterilized in much higher percentages than whites and non-recipients. Case law and government studies are replete with evidence of sterilization abuse among Puerto Rican, Native American, Black, and Mexican American women and among welfare recipients in general. Studies of medical practice in teaching hospitals reveal that both tubal ligations and hysterectomies have been routinely performed on poor and minority women with no justification other than the training needs of interns and residents.

The Department of Health, Education, and Welfare recognized these abuses in drafting new sterilization regulations. Even if there were full compliance with the regulations, however, sterilization abuse would continue unless abortion is fully available to Medicaid recipients.

II.

Just as women turned to sterilization out of fear of unwanted pregnancies

prior to the legalization of abortions, so they are now denied reproductive choice by unconstitutional restrictions on public expenditures. The most reliable forms of birth control, the pill and the IUD, present serious medical risks to many women. Poor women who turn to self-induced or back-alley abortions in the face of unwanted pregnancy face even greater risks. Thus, sterilization, although a drastic measure for women who are not ready to end their reproductive lives, becomes the lesser evil. The discrepancy in funding for abortion and sterilization forebodes a return to this "package deal."

III.

The disparity of funding between abortion and sterilization has the effect of compelling poor and minority women to be sterilized in violation of their constitutional rights.

This disparity is inconsistent with the purpose of the medical provisions of the Social Security Act which were promulgated to provide medical assistance to all eligible individuals for all medically necessary services.

The Hyde Amendment is inconsistent with the family planning services provisions

which mandate that consent to sterilization be voluntary and not coerced.

As long as the Hyde Amendment remains in effect, the medical assistance provisions of the Social Security Act operate as a sterilization law, which places Medicaid recipients in a coercive situation tantamount to state-induced sterilization. The funding disparity also violates a woman's constitutionally protected right to choose whether or not to be sterilized, which is derived from the right to privacy in making reproductive choices. The effect of the funding disparity does not survive the strict scrutiny to which sterilization laws are subject. Minority women, who rely on public funding for abortion in far greater proportions than white women, are the victims of invidious discrimination.

No compelling state interest justifies either the invidious discrimination or the impingement on a woman's privacy rights which the discrepancy in funding represents. Any asserted governmental interest in promoting childbirth over abortion is clearly contradicted by funding for sterilization, which in fact discourages childbirth.

To compel poor and minority women to forfeit their fertility in order to prevent an unwanted pregnancy is constitutionally impermissible.

ARGUMENT

INTRODUCTORY STATEMENT

Amici believe that the Hyde Amendment restrictions upon government funding for medically necessary abortions force many poor women who may need such abortions to select irreversible sterilization procedures as the only way to prevent injurious and unwanted pregnancies. Such sterilizations are involuntary and coerced. The federal government denies federal funds for virtually all abortions, while assuring full Medicaid funding for the sterilization of poor women, with 90 percent of the costs met by federal funds. The dangers inherent in this policy can be understood only in the context of past and present involuntary sterilizations performed upon poor and minority women.

Amici believe that the disparity in funding for abortion and sterilization results in a violation of the Equal Protection Clause of the Fourteenth Amendment. The Hyde Amendment restrictions are inconsistent with the most basic purpose of the Social Security Act's Medicaid provisions and fail to provide all medically necessary procedures to all eligible individuals on an equitable basis. This results in an unequal and therefore unconstitutional application of the law which

bears no rational relation to any legitimate state purpose. Finally, amici oppose the restrictions on funding for medically necessary abortions on the ground that they place an impermissible burden on a woman's constitutionally protected right to privacy in matters of reproductive choice.

While confining themselves to the discussion herein, amici urge this Court to affirm on the basis of all arguments which are set forth by appellees.

I.

HISTORICAL EVIDENCE DOCUMENTS STERILIZATION ABUSE AMONG POOR AND MINORITY WOMEN.

A. Sterilization Abuse Defined.

Sterilization abuse is the involuntary termination[1] of reproductive capacity. It occurs when a woman is sterilized as a result of economic coercion; when a woman is sterilized without understanding the irreversible nature of the operation; when a woman is sterilized for lack of viable alternatives from which to choose.[2]

Sterilization abuse has taken and continues to take a variety of forms. This was explicitly recognized by the Department of Health, Education and Welfare in promulgating regulations designed to protect people

[1] "An act is voluntary if it is intentional and not induced by coercion. An agreement to be sterilized is a contract...(s)afeguards are especially appropriate where the Federal Government is financing an intrusion on a citizen's body which has a permanent effect on the reproductive process." Relf v. Mathews, 403 F. Supp. 1235, 1238 (D. D.C., 1975).

[2] Throughout, amici address issues of sterilization abuse which affect women, since the abortion-funding issue only concerns women. Sterilization abuse can also affect men, although there is little documentation on systematic male sterilization available.

from this abuse.[3]

[3] The DHEW regulations were adopted by the Secretary on November 8, 1978 and became effective 90 days after adoption. The Regulations apply to all government-funded sterilizations.

Most importantly, the Regulations provide that:

"(e) Informed consent may not be obtained while the individual to be sterilized is (i) In labor or childbirth; (ii) Seeking to obtain an abortion." (emphasis added) 42 CFR 50.204 (1978).

This is a clear acknowledgement of the particular pressures upon women seeking abortions and the interrelationship between the abortion decision and sterilization abuse.

Women's consent to sterilization has been coerced under threat of withholding essential government benefits or medical treatment or as the price for obtaining an abortion. Women have been incorrectly told that their sterilizations were reversible. "Consent" to sterilization has been extracted from women while they were hospitalized for childbirth, or abortion. These extremely stressful situations are hardly conducive to thoughtful reflection on a profound life-choice. Women also have been sterilized without understanding the consequences of the surgery when there has not been an explanation in their primary language.[4/]

[4/] See Daily and Nicolas, Tubal Ligation on General Service Patients Seen By Peer Level Family Planning Counselors in Thirty New York City Voluntary and Municipal Hospitals, 123 AM. J. OF OBSTETRICS AND GYNECOLOGY, 656, 657 (1975), and Rothchild, Why Sterilization Guidelines are Needed, at 3 (N.Y.C./H.H.C., December 10, 1975).

Sterilization abuse can occur when doctors' interests conflict with their patients' health and welfare. The sterilization procedure is urged on patients for a variety of reasons: because it provides an opportunity for inexperienced doctors to practice surgical techniques; because the availability of federal funds for reimbursement makes it profitable to health-care providers; or because it circumvents the legal restrictions on simultaneously performed abortions.[5/]

Sterilization abuse historically has had a disproportionate impact on both poor and minority women.[6/] Indigent women

[5/] Physicians' attitudes toward the poor contribute to sterilization abuse. As Dr. Donald Sloan of Metropolitan Hospital in New York has said, "We practice on the poor so we can operate on the rich. Hysterectomies and simple tubal ligations are performed all the time just for the practice." Medical Tribune, September 21, 1977, reprinted in the 95 Cong. Rec. S 19813 (daily ed., December 15, 1977). See also Section I.C., infra.

[6/] See Section II B., Infra.

have always been particularly vulnerable to coercion in making the sterilization decision.[7] With the withdrawal of Medicaid funds for abortions, the economic coercion exerted on poor women takes on a new and more drastic character. Women who at any given time know they cannot support an additional child, either economically or emotionally are faced with a Hobson's choice: accept irreversible sterilization; seek unsafe or costly abortions; or remain exposed to the risk of unwanted and injurious pregnancies until the onset of menopause. Whenever a woman is forced to choose sterilization because she knows that a safe, legal abortion will not be available should contraception fail, that

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[7] Judge Gessell remarked that there was a growing number of sterilizations among poor people, stating: "Few realize that over 16 percent of the married couples in this country between the ages of 20 and 39 have had a sterilization operation. Over the last few years, an estimated 100,000 to 150,000 low-income persons have been sterilized annually under federally funded programs." Relf v. Weinberger, 372 F. Supp. 1196, 1199 (D. D.C. 1974).

woman is the victim of sterilization abuse.[8]

B. Prior to the Legalization of Abortion, Doctors Conditioned Abortion on a Woman's Agreement to Concurrent Sterilization.

The reasons doctors required sterilization as a condition of abortion prior to legalization were twofold. First, they were subject to criminal penalties for wrongfully certifying that an abortion was necessary to preserve the life of the woman. If a doctor indicated that medical risk was severe enough to warrant sterilization, this bolstered the doctor's justification for certifying the abortion. Secondly, if a doctor sterilized the woman by hysterectomy, the abortion did not have to be reported since it was incident to the removal of all reproductive organs.

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[8] However, sterilization abuse has an impact on working women as well. Recently several women employees at American Cyanamid revealed that they had been given a "choice" of either agreeing to sterilization or suffering demotion or loss of employment. Christman v. American Cyanamid Co., No. 80-0024-P (N.D.W.V.) (Filed January 29, 1980).

Requiring that a woman agree to be sterilized as the price for an abortion was therefore a common practice throughout the United States.[9] This requirement was applied to at least some of the patients in 53.6 percent of the teaching hospitals surveyed by the American College of Obstetricians and Gynecologists and the American Public Health Association.[10]

A return to the pre-1973 criminal standards for federal funding of abortions forbodes a return to this package deal: doctors will agree to perform funded abortions in return for the woman's "consent" to sterilization, either to justify the diagnosis for certification, or to obtain reimbursement for the sterilization procedure instead of the abortion.

9/ Bingham, T. 476.

10/ Eliot and Wilson, The Obstetricians' View, ABORTION IN A CHANGING WORLD, 93 Columbia University Press (1970).

C. Sterilization Abuse Has Had a Disproportionate Impact Upon Poor and Minority Women.

The incidence of sterilization abuse in federally funded family planning programs was exposed in the case of Relf v. Weinberger, 372 F. Supp. 1196 (D.C. 1974). The Relf sisters and three black teenagers from Alabama were refused medical assistance unless they consented to sterilization. Two of the Relf children, 12 and 14 years old, were sterilized without their parents' knowledge or consent.[11]

The Relf Court, finding on behalf of the victims of sterilization, stated:

11/ A subsequent investigation found that the same Alabama clinic had sterilized 11 young girls, 10 of them black. A study by DHEW's Center for Disease Control found that a total of 153 women under the age of 18 had been sterilized in funded family planning programs during 1972. Vaughan and Sparer, 6 Family Planning Perspectives 224 (1974).

> "...there is uncontroverted evidence in the record that minors and other incompetents have been sterilized with federal funds and that an indefinite number of poor people have been improperly coerced into accepting a sterilization operation under the threat that various federally supported welfare benefits would be withdrawn unless they submitted to irreversible sterilization. Patients receiving Medicaid assistance at childbirth are evidently the most frequent targets of this pressure as the experience of plaintiffs Water and Walker illustrate." Id. at 1199.

Walker v. Pierce, 560 F.2d 609 (4th Cir. 1977) provides a striming illustration of many Medicaid recipients' vulnerability to sterilization abuse. Dr. Pierce, the only doctor in a rural county hospital who accepted Medicaid patients, admitted that he refused all medical treatment to his financially dependent patients unless they would submit to sterilization after the birth of their third child.

Minority women whose primary language is not English are extremely vulnerable to sterilization abuse. In Madrigal v. Quilligan, No. 75-2057 (C.D. Cal. 1978), ten

Mexican-American women who were sterilized without consent sued the University of Southern California, Los Angeles Medical Center. One of the women who discovered that she had been sterilized while she was hospitalized for a Caesarian when she subsequently returned to the hospital to obtain contraception. Her hospital consent form was signed by her common law husband who thought that he was consenting to the Caesarian. The other women in Madrigal were persuaded to sign consent forms while they were in labor and anesthetized. The plaintiffs were not informed that the operation was irreversible; their consents were obtained in English although only one of the women was fluent in English.[12/]

Representative of another vulnerable group of women is the plaintiff in

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12/ The plaintiffs in Walker and Madrigal were unsuccessful. In Walker, the Court held that the doctor's policy did not involve state action and therefore was not subject to judicial review. In Madrigal, the plaintiffs failed to show that the doctors had acted intentionally and in bad faith.

Johnson v. The City of New York, No. 10784/77 (Sup. Ct. N.Y., Kings Cty., filed 1977).This 19 year old black woman was taken from Rikers Island Prison to Kings County Hospital for an abortion. When she was asked whether she wanted any more babies "now" she was told that her tubes could be tied, and then untied once she was a "good girl." Thus, she intentionally was misinformed about the irreversibility of the procedure.[13]

Coercion, resulting from the unavailability of abortion, especially among a largely non-white population, is demonstrated by the history of sterilization in Puerto Rico. Nowhere in the United States are sterilization figures higher.

In 1965, 34 percent of women between the ages of 20 and 49 had been steril-

[13] In Johnson, the New York City sterilization guidelines were violated both with respect to the thirty day waiting period as well as the prohibition against sterilizing persons under age 21.

ized.[14] In 1968, the figure for sterilized women in the same age grouping had risen to 35.3 percent. The sterilization rate among Puerto Rican women with incomes below $5,000. was 43.8 percent.[15] Of the entire group of women sterilized, 36.1 percent expressed post-operative dissatisfaction.[16]

[14] University of Puerto Rico and Puerto Rico Department of Health. ACUTE AND CHRONIC CONDITION AND MEDICAL CARE: OCTOBER 1963-NOVEMBER 1964. In Puerto Rico, sterilization was so common that it was referred to as la operacion (the operation).

[15] Vasquez Calzada, LA SITUACION POBLACIONEL EN PUERTO RICO, 1968.

[16] Presser, VOLUNTARY STERILIZATION: A WOPLO VIEW - 5 REPORTS ON POPULATION/FAMILY PLANNING 1 (1970) at 50. One reason offered for this high regret rate is that doctors neglect to give women sufficient information about the psychological and possible physiological side effects which may result from sterilization. San Juan Star, January 21, 1975, cited by EPICA Task Force. PUERTO RICO: A PEOPLE CHALLENGING COLONIALISM (1976), at 46.

The high sterilization rate and perhaps the high regret rate in Puerto Rico since 1965 appears to be related to the inaccessibility of either abortion or birth control. Abortion was illegal and violators were subject to imprisonment for two to five years,[17] Low income women were subjected to the most stringent eligibility restrictions.[18] Sterilizations of Native American women also are alarming. That many Native American women are dependent upon public health facilities which makes them particularly vulnerable to sterilization abuse was confirmed by a 1976 General Accounting Office survey. This survey revealed that 3,000 female sterilizations had been performed in a four year period in the federally funded facilities of the Indian

17/ Quay, JUSTIFIABLE ABORTION: MEDICAL AND LEGAL FOUNDATIONS, 29 Geo. Law J. 509 (1961).

18/ Id. at 509. Only wealthy women could afford a black market abortion. While government funds were unavailable for abortion and were inadequately used to counsel women in birth control methods, 90 percent of the cost of funded sterilizations was provided by the federal government.

Health Service.[19]

Before public funding for abortions was available, black women were sterilized at a rate which was double the rate affecting white women. A 1970 study shows that approximately 16 percent of all Black married women of child bearing age were sterilized as compared to the 7 percent of all married white women in that same category.[20] It should be noted, however, that once publically funded abortions became available, the disparity in sterilization between black and

19/ General Accounting Office Report # B-164031 (5). This survey revealed many specific abuses. The consent forms which were on file were "generally not in compliance with .... regulations." The most widely used consent form "did not indicate that the basic elements of informed consent had been presented orally to the patient." The GAO report also exposed 13 sterilizations of minors and 13 violations of the 72 hour waiting period which was then in effect. Individual Native American women have sued for sterilization abuse. See Serena v. Leezer, No. 74-313 (W.D. Pa.) (filed April 1974) brought by a Shawnee Indian against health and welfare officials in Armstrong County, Pennsylvania for sterilizing her without her knowledge or consent after the delivery of her youngest child.

20/ Presser, Op. cit.

white women evened out.[21]

Although comparable national data is not available for Hispanics in the United States, a study of New York City voluntary and municipal hospitals made in 1973 concluded that the proportion of Spanish-speaking women sterilized was almost three times as great as the proportion of black women and six times as great as the proportion of white women.[22]

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[21] 11 FAMILY PLANNING PERSPECTIVES 253 (1979).

[22] C.A. Westoff and C.F. Westoff, FERTILITY, CONTRACEPTION AND ABORTION IN AMERICA, 22 (1971). A 1972 study which compared female sterilization patients to all female family planning patients revealed striking racial and ethnic disparities. White women comprised 53 percent of all family planning patients but only 40 percent of the sterilization patients. In contrast, while only 11 percent of all family planning patients were Hispanic, 17 percent of the sterilization patients were Hispanic. This study also indicated that 37 percent of the family planning patients were black which was compared to the 43 percent of the sterilization patients who were black. Vaughan and Sparer, op. cit. at 225.

A 1972 study revealed that non-white women were sterilized in much larger numbers than their representation in the population of all family planning patients, and in greater percentages than white women.[23] The same study revealed a similar disparity between women receiving public assistance and non-recipients.[24]

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	Percentage of total sterilization patients	Percentage of total family planning patients
whites	40	53
Hispanics	17	11
blacks	43	37

Vaughan and Sparer, op. cit. at 225

[24] Public assistance recipients constituted 28 percent of all female sterilization patients in 1972 although they constituted only 16 percent of all female family planning patients. Non-recipients constituted 72 percent of all sterilization patients but 84 percent of all family planning patients. Even when these numbers are adjusted to take into account both the age and number of children of sterilization patients (utilizing the theory that the older the woman is and the fact that she has more children increase the likelihood that sterilization was voluntary), there remains a positive correlation between those on public assistance and their rate of sterilization. When the data is controlled for the age and the number of children, the difference between white and non-white welfare

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Black women under 21 years of age have been reported to be sterilized with greater frequency than white women of the same age.[25]

Although comprehensive figures are not available on the incidence of sterilization since the passage of the Hyde Amendment, data now being collected indicates that a number of states curtailed abortion funding and at the same time increased expenditures

24/ ... cont'd.
recipients in 1972 becomes striking. For whites, the sterilization rate of welfare recipients falls below that of non-recipients. But for non-whites the data suggest that welfare recipients have about one-third more sterilizations than non-recipients. Id.at 228-229.

25/ Hellman, Louise M., M.D., The Sterilization of Minors and Others Legally Incapable of Consenting: A Review of Current Information, Public Health Center (December 28, 1973).

for sterilizations.[26]

26/

States with a higher than average Medicaid sterilization rate where sterilization spending increased in 1978 while Medicaid funding for abortion was curtailed	Medicaid abortions 1977	1978
Alabama	1000	9
Arkansas	677	0
Idaho	100	21
Indiana	0	4
Nebraska	500	0
New Hampshire	200	1
West Virginia	low in both yrs.	
Wyoming	100	0

Interview with Joy Dreyfoos, Fellow, Alan Guttmacher Institute, in New York City (March 11, 1980).

Non-white women rely on Medicaid funding for abortion in much larger proportion than white women. Over 38 percent of all black and other minority women rely on funding as contrasted with 7 percent of white women who avail themselves of funded abortions. Ayres, Sterilizing the Poor, THE NATION, (July 8, 1973).

The logical inference from these statistics and facts is that minority women on public assistance are sterilized in greater numbers because they depend in greater numbers on publicly funded abortions. When public funds are not available for abortions, as was the situation in 1972, these women must turn to sterilization which was and continues to be funded.

D. The Sterilization of Poor and Minority Women for Medical Training Adds to the Probability of Sterilization Abuse.

Sterilization of Medicaid patients to accommodate the training needs of interns and residents[27] is a common phenomenon.

"There has been a virtual epidemic of sterilizations in American teaching hospitals where the 'pushing' and 'hard selling' of sterilization has been directed almost exclusively to poor and minority women, many of whom agree to the operation under duress."[28]

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[27] In order to obtain certification from the American Board of Surgery, or the various surgical subspecialty groups, doctors in training must perform or assist at a certain number of operations. Law, Sterilization Comes Easier for the Disadvantaged, N.Y.U. Law Journal 16 (1976).

[28] Spriggs, Note, Involuntary Sterilization: An Unconstitutional Menace to Minorities and the Poor, 4 NYU Review of Law and Social Change 127, 131 (Spring 1974).

Major teaching hospitals have routinely violated DHEW Regulations promulgated to prevent such abuses.[29]

Dr. Sloan testified in the lower court to the use of tubal ligations to train interns and residents in surgical procedures because the operation is so simple to perform, citing instances where "resident training" was the only medical reason indicated for performing the sterilization.[30] Training considerations also may cause physicians to pressure patients into consenting to hysterectomies instead of less radical

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29/ A survey of the 50 largest U.S. teaching hospitals, nine months after court ordered HEW regulations to prevent coercive non-therapeutic sterilizations became effective, revealed that 33% were not even aware of the legal requirements and that 76% were in violation of the regulations. McGarrah, Sterilization Without Consent: Teaching Hospital Violations of HEW Regulations, Health Research Group (January 1975).

30/ Tr. 1657, 1711, 1723, 1727.

sterilization procedures.[31]

The cultural bias of many doctors,[32] as well as the need for training, causes doctors to set aside the patient's interests. As Dr. Richard Hauskneck, a New York City obstetrician-gynecologist, explained:

> "Most physicians come from the upper one percent of White American society. The only contact we had with poor blacks and Puerto Ricans is as servants. So a vast majority of doctors feel that blacks and Puerto Ricans are less worthy. When you superimpose racism over the pressing desire for training, you arrive at the present situation. Some white obstetricians... think nothing at all of interfering with the procreative process of black

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31/ At Boston City Hospital, the Health Research Group reported the following conversation: "When the student asked the resident why this woman was having a hysterectomy instead of a tubal ligation, he was told,...'we like to do a hysterectomy, it's more of a challenge...you know a well-trained chimpanzee can do a tubal ligation...and it's good experience for the junior resident." Rosenfeld, Wolfe and McGarrah, Health Research Group Study on Surgical Sterilization: Present Abuse and Proposed Regulations, Washington, D.C. (October 1973), at 3.

32/ A Planned Parenthood study of physicians attitudes, for instance, disclosed that 94 percent of the obstetrician-gynecologists in the survey favored compulsory sterilization or

cont'd.

and Puerto Rican women."[33]

[32]...cont'd.
withholding of welfare support for additional children of welfare mothers with out of wedlock children. 1 Family Planning Digest 3 (1972).

[33] Spriggs, op. cit. p. 131 n. 44

II.

WOMEN CANNOT VOLUNTARILY CONSENT TO STERILIZATION WHEN VIABLE OPTIONS ARE PRECLUDED OR CONSENT IS COERCED

A. Sterilization Abuse Results from the Implementation of the Hyde Amendment Restrictions on Abortion Funding.

The unavailability of abortion forces women to choose between life-threatening or unreliable contraceptive techniques and sterilization.

The Hyde Amendment has deprived most poor women of the option of using abortion when contraception fails.[34] Given that the most reliable forms of contraception, the pill and the IUD, present health dangers to many women,[35] indigent women's choices are

[34] Abortion rates in the states which have adopted restrictive payment standards for abortion have declined an average of 98.2 percent.

[35] Birth control pills have a 98 percent effectiveness rate but are linked in some women to depression, increased tendency to abnormal blood clotting, increased risk of heart attack and stroke (especially in women over 35 who smoke), and a small increased risk of liver or gall bladder disease. IUDs have a 96 percent effectiveness rate but have been linked in some women to irregular periods, cramps, and increased risk of infection of the uterus. DHEW, Sterilization and Abortions: Federal Financial Participation, 43 Fed. Reg. 52, 168 (1978.

severely limited. Women who use the medically safer but less reliable diaphragm or condom are most likely to become pregnant.[36] Once pregnant, indigent women can "choose" between an unwanted and/or medically injurious pregnancy and a back-alley or self-induced abortion.

It is not surprising that women agree to sterilizations when the lack of access to abortion is considered along with the drawbacks of available forms of contraception and these considerations are balanced against fully funded sterilizations. It is also understandable that doctors may encourage patients eligible for public assistance to choose sterilization, since it may be the safest medical alternative which is

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[36] Diaphragms have an 85-90 percent effectiveness rate and Condoms are 90 percent effective. Id.

available to them.[37]

Prior to legalization of abortions, women had surgical tubal ligations out of fear of future, unwanted pregnancies.[38] Lack of funding for medically necessary abortions will take a similar toll. Dr. Sloan, who testified from his own experience with poor women and the pressures on them to be sterilized, believes that the funding policies are inherently coercive:

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[37] Many women continue use of the pill and the IUD despite the danger inherent in these forms of contraception because they wish to retain the possibility of having a child at some time in the future, despite their fear of pregnancy. As Frederick Jaffe, Founder and President of the Alan Guttmacher Institute testified, if abortion was available, women could switch from life endangering pills and IUDs to the diaphragm and condom, and deaths arising from fertility control would decrease. T. 1474. A recent study of fertility control and mortality rates found that "At all ages, the lowest level of mortality by far is achieved by the combined regimen, that is, use of traditional contraception methods with recourse to early abortion in case of failure. (Pl.'s Ex. 16)

[38] Sloan, T., 1676. Dr. Sloan is a practising physician and assistant clinical professor of Obstetrics and Gynecology at New York Medical College.

> We have the one factor of the encouragement of sterilization and the other factor that if she has not got accessibility to the abortion status, and she knows it, her yielding will be that much greater. I see the handwriting on the wall.[39]

[39] Sloan, T. 1675.

B. Sterilization Abuse Results from Uneven Enforcement and Inadequate Monitoring of the Department of Health, Education and Welfare Guidelines.

A woman faced with the risk of having a child whom she is unable to support, financially and emotionally, is subject to coercion analogous to the past practice of threatening Medicaid recipients with termination of government benefits for refusal to be sterilized.[40] The only certain way

[40] The DHEW Regulations recognized the coercive impact on Medicaid recipients of the threat to cut off government benefits and designed the sterilization consent form with a notice in bold face appearing at the top. It reads: "Notice: YOUR DECISION AT ANY TIME NOT TO BE STERILIZED WILL NOT RESULT IN THE WITHDRAWAL OR WITHHOLDING OF ANY BENEFITS PROVIDED BY PROGRAMS OR PROJECTS RECEIVING FEDERAL FUNDS."

The second paragraph of the consent form reiterates the guarantee: "...If I decide not to be sterilized, my decision will not affect my right to future care or treatment and I will not lose any help or benefits from programs receiving Federal funds, such as AFDC or Medicaid, that I am now getting or for which I may become eligible." 43 CFR Sec. 50.209(a) (1978).

for an indigent woman to avoid an unwanted pregnancy, as long as abortion is unavailable, is to permanently terminate her reproductive capacity. The DHEW regulations, while admirably motivated, can do nothing to alter this hard fact.

The regulations specifically provide that a woman may not consent to sterilization if she is hospitalized for an abortion, but a woman and her doctor may easily circumvent this regulation if they are determined to do so,[41] By simply agreeing not to disclose the fact that there has been an abortion incident to sterilization, the doctor obtains reimbursement from Medicaid, and the woman terminates her pregnancy, but

[41] 42 CFR 50.204 (e) (1978) provides that: "Informed consent may not be obtained while the individual to be sterilized is...(ii) Seeking to obtain or obtaining an abortion. ...". See also, 45 CFR §205.35.

at the cost of her reproductive capacity. Moreover, prior history[42] and a recent study by the Public Citizen Health Research Group indicate the inability of the DHEW to effectively enforce the regulations it has

[42] As Judge Gesell stated in Relf v. Mathews,

> ...HEW is not sufficiently funded to enable it systematically to monitor individual decisions to sterilize. Thus HEW must depend in substantial degree on a complex series of procedures to be undertaken by persons not realistically subject to supervision and control or otherwise responsive to Congress. The experience with other phases of the sterilization problem shows the extreme difficulty that HEW is having in monitoring even the simplest safeguards.

403 F. Supp. 1235, 1238, vacated as moot 565 F. 2d 722 (D.C. Cir. 1977).

promulgated.[43]

43/ Bogue and Sigelman, Sterilization Report No. 13: Continuing Violations of Federal Sterilization Guidelines By Teaching Hospitals in 1979, PUBLIC CITIZEN (July 17, 1979).

This study was based on a survey of teaching hospitals in the United States with approved obstetrics/gynecology residency programs. Among the most shocking results of the study were the following:

(1) 70 percent of the responding hospitals, by 1979, had not yet complied with the less stringent 1974 DHEW regulations Id. at 4;

(2) 14 percent of the responding hospitals had not even received copies of the 1978 regulations. Id at 5;

(3) 21 percent of the responding hospitals continued to perform prohibited hysterectomies solely for family planning purposes. Id. at 5; and

(4) The rate of non-compliance for those hospitals refusing to complete the questionnaire may be considerably greater than that of hospitals which were willing to make public their sterilization practices. Id at 5.

The study also indicates that even if the regulations were to be enforced in the future, the only available sanction by the DHEW would be a denial of Medicaid reimbursements after the sterilizations were actually performed and permanent damage done.

III.

DENYING FUNDING FOR MEDICALLY NECESSARY ABORTIONS WHILE PROVIDING FUNDING FOR STERILIZATION FORCES POOR AND MINORITY WOMEN TO BE STERILIZED, IN VIOLATION OF THEIR CONSTITUTIONAL RIGHTS TO PRIVACY AND EQUAL PROTECTION.

A. Implementation of the Hyde Amendment Results in a Funding Disparity which Undermines the Purposes of the Social Security Act.

By providing full funding for sterilization, while restricting funding for medically necessary abortions,[44] the state creates a funding disparity which effectively

44/ The Medicaid statutes make "family planning services," including sterilization mandatory. 42 U.S.C. Sec. 1396d(a)(4)(B); 42 CFR Sec. 440.220. States must pay for such services at a rate not less than 40 percent of the non-federal share. 42 USC Sec. 1396 a(2). The federal government picks up 90 percent of the cost and states fund the rest. Title XIX Sec. 1903(5). In effect, sterilization is fully funded. On the other hand, "Publicly funded abortions for the poor declined by 99 percent in Hyde Amendment States...The reason: Doctors and institutions have been unwilling to risk performing abortions that...might (not be) reimburse(d)... Patients are afraid or ashamed to report cases of rape or incest, and are misinformed ...about whether the government will pay for any abortions." (Emphasis in original). ABORTIONS AND THE POOR: PRIVATE MORALITY, PUBLIC RESPONSIBILITY, a publication of the Alan Guttmacher Institute (1979), at 24.

coerces the sterilization of Medicaid recipients who fear unwanted pregnancies.

This funding disparity is contrary to the purpose of Title XIX of the Social Security Act, which establishes a Medicaid program to provide medical assistance to all eligible individuals for all medically necessary services. Services provided are to be equal in amount, duration and scope, within included categories, for all recipients covered.[45] Courts have interpreted the statute to mean that such services must be distributed in a manner which bears a rational relationship to the basic federal purpose of providing medical services to those in greatest need of them.[46]

45/ 42 U.S.C. Sec. 1396 et seq.

46/ White v. Beal, for example, held that a state must demonstrate a reasonable relationship to medical need when choosing to fund one procedure rather than another under Medicaid. 555 F.2d 1146 (3rd Cir. 1977), aff'g 413 F. Supp.1141 (E.D.Pa. 1976). See also 42 CFR Sec. 440.200(2), which states that restraint on funding can only be based on medical necessity.

The basic federal purpose underlying the statute is clearly undermined by forcing indigent women to undergo sterilization. No health interest is served by sterilizing women who would prefer to maintain their childbearing capacity if abortion were available.[47] Therefore, the funding disparity bears no rational relationship to the basic purpose of the Act.

The Hyde Amendment restrictions also undermine the statutory provisions authorizing funding for family planning services which state that consent to sterilization must be voluntary.[48] In order to make

47/ Compare the major complication rate for tubal ligations (2.8 per 100 women) and hysterectomies (17.9 per 100 women), with the major complication rate for abortion (0.4 to 2.3 per 100 women, depending on gestation period). It must be concluded that abortion is a medically safer procedure. Sources are: Greenspan, THE COLLABORATIVE REVIEW OF STERILIZATION (CREST) paper presented to the Am. Pub. Health Assoc. (Nov. 2, 1977); and Tietze, INDUCED ABORTION: 1979, a Population Council Fact Book (3d ed., 1979).

48/ 42 CFR Sec. 441.20 states that decisions made by patients in the area of family planning services must be free from coercion. See also 42 U.S.C. Secs. 300a-5; 602(a)(15); 708(a); 705(a)(14).

a voluntary choice regarding sterilization, a person must be able to choose from a reasonable range of the available methods of reproductive care. When that range is so severely proscribed as to make "choice" illusory, a person's reluctant acquiescence hardly falls within the concept of voluntariness. Sterilizations performed as a result of the kinds of coercive pressures noted above do not meet the requirement of voluntariness which is statutorily mandated.

B. Under the Hyde Amendment, the Medical Provisions of the Social Security Act Become, in Effect, a Sterilization Law Which Invidiously Discriminates Against Poor and Minority Women.

The disparity of funding resulting from the Hyde Amendment renders the medical assistance provisions of the Social Security Act a de facto sterilization law which robs Medicaid recipients who fear unwanted pregnancies of the ability to control their own procreativity. This Court has held that the classifications in a state's sterilization law are subject, under the Equal Protection Clause, to strict scrutiny to determine whether they invidiously discriminate against

groups or types of individuals.

In Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), this Court noted that "... (t)he power to sterilize, if exercised, may have subtle, far-reaching, and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear."

A law mandating sterilization of minority women would clearly be repugnant. Amici believe that the disparity of funding between abortion and sterilization subjects poor, and, especially, minority women[49/] to coercion tantamount to state induced sterilization. Coerced sterilization of Medicaid recipients, especially minority women in the program, results in invidious discrimination which fails the strict scrutiny test of Skinner. Id. at 541.

C. The Disparity in Funding Results in an Impermissible Burden on a Woman's Right to Privacy, Which Includes the Right to be Free from Involuntary Sterilization.

As Judge Cardozo noted in

49/ Justice Marshall, dissenting in Beal v. Doe 432 U.S. 438, 459, n.3 (1977) presented documentary evidence of the disparate importance and impact that abortion as a family-planning method has on minority women as opposed to non-minority women.Cont'd.

Schloendorff v. The Society of New York Hospital, 211 N.Y. 125, 105 N.E. 92 (Ct. App., 1914), "(e)very human being of adult years and sound mind has a right to determine what shall be done with his own body."

This common law right to control one's body has assumed constitutional dimensions. Eisenstadt v. Baird stated that "(i)f the right of privacy means anything, it is the right...to be free from government intrusion into matters so fundamentally affecting a person as the decision whether to bear a child." 405 U.S. 438,453(1972). And, in Roe v. Wade, 410 U.S. 113 (1973), this Court held that the constitutional right to privacy "...is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Id., at 153. Accordingly, state action which impinges upon the exercise of reproductive rights must be justified by a compelling state interest which closely corresponds to the regulatory measure adopted. Doe v. Bolton, 410 U.S. 179 (1973).

49/ cont'd...
See also discussion in Sec. 1B, supra.

The right to choose whether or not to be sterilized, free from state interference, is a constitutionally protected right which flows from the right to privacy in making reproductive choices. Courts have recognized that the right to make personal decisions about sterilization is "...one of the basic civil rights of man." Skinner v. Oklahoma, supra, at 541.[50/]

Amici submit that the funding disparity which results from the Hyde Amendment's implementation and the government funding of sterilization is state action which impinges on a fundamental right and is not justified by a compelling state interest.

50/ See also Hathaway v. Worcester City Hospital, voiding on privacy grounds a statute which prohibited performance of sterilizations in a public hospital. The court reasoned that the statute impinged on a patient's right to choose sterilization. 475 F.2d 701 (1st Cir., 1973). Prohibition of sterilization, as well as compulsion, is proscribed.

D. No Compelling State Interest Justifies the Disparate Funding of Abortion and Sterilization.

Amici have demonstrated how the effects of the funding disparity between the Hyde Amendment restrictions on abortion and the federal policy of fully funding sterilizations impinges on poor and minority women's constitutional rights.

In Maher v. Roe, 432 U.S. 476 (1977) this Court recognized the legitimacy of a state's policy choice to encourage normal childbirth. Amici assert, however, that the government's continued funding of sterilizations under the family planning section of the Social Security Act belies the purported interest in encouraging childbirth.[51] First, it manifests a governmental intent to prevent childbirth. Secondly, it has the effect of

[51] Furthermore, the purpose in denying Medicaid funding for abortions is not to encourage childbirth, as the Congressional debates surrounding the DHEW funding bills clearly demonstrate. The record shows that the actual motive is opposition to abortion on moral grounds, a purpose which fails to satisfy the requirements of strict scrutiny and which conflicts with the Court's prior decision on abortion. See Roe v. Wade, supra. See also the explicit language in Cont'd.

forcing women who might want to give birth to children later to permanently terminate their childbearing capacity.

Poor women who are coerced into sterilization are deprived of their constitutional rights to privacy and equal protection under circumstances which have a proportionately greater impact on the reproductive rights of minority women.

A woman who forfeits her fertility in order to prevent or terminate an unwanted pregnancy is deprived of the freedom to procreate for the rest of her life. To exact such a price from women for their sexual activity, their poverty and their medical vulnerability is constitutionally impermissible.

[51] Cont'd...
the debate on the Resolution to Instruct Conferees on H.R. 7555 (The Hyde Amendment). 95 Cong. Rec. H 10131 (daily ed. Sept. 27, 1977).

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

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* Counsel gratefully acknowledge the assistances of Mark Aguiar, a second year law student at New York University School of Law, Mayda Alsace, a second year law student at New York University School of Law, Janet Price, a second year law student at New York University School of Law, Steven Rosen, a second year student at New York University School of Law, Karen Stamm, a consultant on sterilization abuse.